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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6386

WILLIAM JAMES RUMMEL, Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, Respondent

* * *

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITIONER'S REPLY MEMORANDUM

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Scott J. Atlas
VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner

Of Counsel:

Charles Alan Wright
2500 Red River
Austin, Texas 78705

May 10, 1979

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REPLY

I.

PETITIONER HAS NOT PROCEDURALLY DEFAULTED THE RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT ON THAT BASIS AT THE PUNISHMENT PHASE OF HIS TRIAL.

For the first time in this habeas proceeding,[1] Respondent argued in the court below, Second Supplemental Brief of Respondent-Appellee at 36-40, Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (en banc), and again in this Court, Brief in Opposition of Respondent, Rummel v. Estelle, No. 78-6386, at 8-9 (filed Mar. 19, 1979) (hereinafter cited as "Respondent's Brief"), that the combination of the federal "procedural default doctrine" and the Texas "correct contemporaneous objection rule" bars Rummel from objecting to his punishment as unconstitutionally cruel and unusual because he failed to object to his sentence during the punishment stage of his trial. But this argument must fail because (1) Respondent waived it by not raising it below and (2) Texas law permits a constitutional objection of this nature to be made at any time.

A. Respondent Waived Its Right to Argue Procedural Default by Not Raising the Argument in the Lower Court.

Rule 8(c) of the Federal Rules of Civil Procedure[2] requires that all affirmative defenses be alleged in responsive trial pleadings: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c) (emphasis added). A failure to plead an affirmative defense waives it, see, e.g. Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 96 (5th Cir. 1976); Phoenix Assurance Co. v. Appleton City, 296 F.2d 787, 792 (8th Cir. 1961), and it cannot be raised for the first time on appeal, e.g., Atlas Assurance Co. v. Standard Brick & Tile Corp., 264 F.2d 440, 443 (7th Cir. 1959). Having failed to raise the procedural default issue below, Respondent cannot raise it now.

B. The Texas Contemporaneous-Objection Rule Does Not Apply to Petitioner's Objection to His Sentence.

In support of its position that Rummel waived his right to object to the life sentence by failing to object at trial, Respondent cites 5 Tex. Jr. 2d, Appeal and Error--Criminal Cases § 22, at 42-43 (1959), cited in Respondent's Brief at 8, but fails to cite the next section, id. § 23, which provides that failure to raise a fundamental error at trial does not preclude raising it on appeal. According to this authority, among such fundamental errors that can be raised at any time is "an objection that the statute under which the defendant was convicted is violative of the constitution," id. at 44 (citing Barnes v. State, 170 S.W. 548, 550 (Tex. Crim. App. 1914), cited approvingly in Gann v. Keith, 253 S.W.2d 413, 417 (Tex. 1952), as the court below recognized, 587 F.2d at 653-54.

Even if it did apply, the two grounds justifying an exception to the procedural default doctrine recognized in Francis v. Henderson, 425 U.S. 536, 542 (1976); accord, Wainwright v. Sykes, 433 U.S. 72, 90-91 (1976) -- "good cause" and "actual prejudice" -- would protect Rummel. "Good cause"

1/ Respondent did not raise this issue in proceedings in either the state courts, the federal district court, or the Fifth Circuit panel.

2/ It appears that the civil procedural rules apply in habeas corpus proceedings. Fed. R. App. P. 8(a)(2) ("these rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions").

is present if the defendant can show that no reasonable person would have freely elected not to object.[3] Surely no one can dispute that Rummel had no reasonable expectation of prevailing in state court on his Eighth Amendment claim, given the long line of Texas cases upholding the habitual provision from Eighth Amendment attack, as pointed out by the court below, 587 F.2d at 653 n.2, and further confirmed in the summary rejection by the Texas Court of Criminal Appeals of Rummel's application for habeas corpus relief on the same issue. Moreover, Rummel obviously had no tactical reason for withholding his objection, since (1) he did not raise the issue in his direct appeal and (2) he would have received no greater relief from a successful appeal than from a successful trial court ruling.

"Actual prejudice" is likewise easily demonstrated, since Rummel has and will continue to serve a significantly longer sentence than he would have if the trial judge had ruled the sentence excessive.

II.

HART AND RUMMEL CANNOT BE RECONCILED

Respondent argues that the contradictory results reached by the Fourth and Fifth Circuits on almost identical facts, compare Rummel (en banc) with Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied as untimely filed, 415 U.S. 938 (1974), is better explained by different fact situations than by different legal tests and cites six post-Hart Fourth

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3/ According to one authority, "a defendant may avoid [procedural default] by showing not only that he did not 'waive' the right by free and intelligent choice but also that no reasonable person would, under the circumstances, have done so." Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Texas L. Rev. 193, 211 (1977).

Circuit cases that allegedly "show a consistent refusal to apply Hart in a variety of contexts." Respondent's Brief at 5.

But the implication that Hart (perjury, forgery, and bad check) involved offenses less serious than Rummel's (credit card abuse, forgery, and theft by false pretext[4]) is patently preposterous. And in each of the cited cases, either the sentence was much less than life and had been assessed by judge or jury rather than imposed by statute or the offenses involved potential violence and danger to life and property,[5] so that the Hart tests were not fulfilled.

III.

THE PROSECUTOR'S DISCRETION TO INDICT HABITUAL OFFENDERS IS NOT AN ISSUE IN THIS CASE

Respondent claims that a holding that Rummel's sentence is unconstitutionally excessive requires holding that the prosecutor abused his discretion in the charging process, Respondent's Brief at 12, and that Respondent should be given the opportunity to demonstrate all factors bearing on the

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4/ Rummel took a check and promised in return to fix an air conditioner. He was convicted for intending not to fulfill the promise when he made it.

5/ See Davis v. Davis, 585 F.2d 1226, 1228 (4th Cir. 1978) (jury assessed 40 year sentence for marijuana dealer); United States v. Williamson, 567 F.2d 610, 616 (4th Cir. 1977) (judge assessed eight years for felon possessing firearms); Robert v. Collins, 544 F.2d 168, 169 (4th Cir. 1976) (per curiam) (judge assessed 20 years, reduced to 15, for person pleading guilty to simple assault after being charged with assault with intent to murder two policemen); Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 96 S.Ct. 1733 (1976) (parole board revoked parole, requiring forgerer to serve 7-year sentence); Griffin v. Warden, 517 F.2d 756, 757 (4th Cir. 1975) (statute mandated life sentence for grand larceny, breaking and entering, and burglary of a home); Wood v. South Carolina, 483 F.2d 149, 150 & n.2 (4th Cir. 1973) (per curiam) (judge assessed 5 years for obscene telephone caller who had prior convictions for burglary, larceny, and auto theft).

prosecutor's original decision, id. at 13. But Rummel challenges the Texas Legislature's right to confer the power to indict a three-time petty property offender under the habitual offender statute, not the prosecutor's decision to exercise that power. Moreover, the factors upon which Respondent requests an opportunity to justify the prosecutor's exercise of discretion are matters that were not a part of the original record but were first raised in an eleventh-hour amicus curiae brief filed shortly before oral argument in the Fifth Circuit en banc. Respondent's attempt to shift the issue from legislative power to prosecutorial discretion and to rely on matters outside the record exposes the weakness of Respondent's position.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Scott J Atlas

Scott J Atlas

VINSON & ELKINS
2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2024

Counsel for Petitioner

CERTIFICATE

I, Scott J. Atlas, do hereby certify that a true and correct copy of the above and foregoing Reply Memorandum has been served by placing same in the United States mail, postage prepaid, certified, on this the 11th day of May, 1979, addressed to Mark White, Attorney General, and Gilbert Pena and Douglas M. Becker, Assistant Attorneys General, all at P.O. Box 12548, Capitol Station, Austin, Texas 78711.

Scott J Atlas

Scott J. Atlas